



Steven Barnard v. Metro Security Forces, Inc., et al.

Appeal from:

St. Joseph Superior Court, The Honorable Margot F. Reagan, Judge

Oral Argument:

Monday, November 9, 2009 12:30 p.m. 20 minutes each side

Civil Law Issue:

Today the court will hear arguments regarding whether the trial court erred when it found an usher, who pushed Steven Barnard, was not an employee of Metro Security Forces, Inc. ("Metro Security") and granted summary judgment in favor of Metro Security on Barnard's personal injury claims.

CASE SYNOPSIS

Facts and Procedural History

On October 26, 2003, Barnard attended an REO Speedwagon concert at the Morris Performing Arts Center (the "Morris") in South Bend, Indiana. The Morris contracted with Metro Security to provide uniform guard services. At least some Metro Security employees wore white polo shirts that said "Metro Security." There were also people working at the concert who wore plain clothes with a tag that said "Usher."

As the concert reached its conclusion, the members of the band began throwing souvenir items into the crowd, including guitar picks and drum sticks. As

Barnard bent over to pick up a guitar pick, an unknown individual with an "Usher" tag stepped on his hand. Barnard pushed the usher off of his hand and stood up, at which time the usher placed both hands on Barnard and pushed him into an adjacent aisle. Barnard collided with a fellow concert goer, who was trying to retrieve a drum stick the band had thrown into the crowd. Barnard was injured in the collision. Barnard also alleges the same usher slapped his wife in the face as they were preparing to leave the Morris.

On October 21, 2005, Barnard filed a complaint and request for jury trial. Barnard alleged the usher was an employee of Metro Security and brought a claim

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against Metro Security under the doctrine of respondeat superior. On December 29, 2008, Metro Security filed a motion for summary judgment alleging the usher was not a Metro Security employee. In support of its motion, Metro Security produced a document entitled "Agreement for Security Services," which stated Metro Security would provide the Morris with "Uniform Guard Services" on an as needed basis. The agreement is dated February 7, 2000, and has a duration from February 15, 2000 to February 15, 2001. It is signed by a representative of Metro Security but not by a representative of the Morris.

Barnard did not produce any evidence in opposition to Metro Security's motion for summary judgment. Rather, Barnard argued Metro Security's designated materials failed to establish a prima facie showing that no genuine issue of material fact existed with respect to the question of whether the usher was a Metro Security employee. The trial court held a hearing on February 17, 2009, and granted summary judgment in favor of Metro Security on February 20, 2009. Barnard now appeals.

Arguments

Metro Security, as the party seeking summary judgment, bears the burden of making a prima facie showing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Once Metro Security satisfies its burden through evidence designated to the trial court, Barnard may not rest on his pleadings but must designate specific facts demonstrating the existence of a genuine issue for trial.

Metro Security argues the evidence it submitted to the trial court, a two-year old contract that is not signed by an agent of the Morris and portions of Barnard's deposition where Barnard describes the attire of the usher differently from the attire of a Metro Security guard, is sufficient to make a prima facie showing the usher was not a Metro Security employee. Barnard did not designate any evidence to demonstrate the existence of a genuine issue of material fact; rather, he argued Metro Security did not produce sufficient evidence to make a prima facie showing. Therefore, the dispositive question is whether Metro Security designated sufficient to make a prima facie showing it did not employ the usher.

Glossary of Terms

<u>Material Fact</u>: A fact that is significant or essential to the resolution of the issue or matter before the trial court.

<u>Prima Facie</u>: At first sight; on first appearance but subject to further evidence or information. Prima facie evidence is evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

<u>Respondent Superior</u>: A doctrine that holds an employer liable for the wrongful acts of an employee if they were committed within the scope of employment.

<u>Summary Judgment</u>: A judgment granted by the trial court before a case goes to trial because there are no genuine issues regarding any material facts in the case and one party is entitled to judgment as a matter of law.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

• Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana: and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue (M.A. and Ph.D., Indiana University). Their son, Douglas, a graduate of the U.S.N.A., recently returned from his second deployment.

TODAY'S PANEL OF JUDGES

Hon. Paul D. Mathias (Allen County)

• Judge of the Court of Appeals since March 2000

Paul D. Mathias was appointed to the Indiana Court of Appeals for the Third District in March 2000. Prior to his appointment, he served as a judge of the Allen Superior Court – Civil Division in Fort Wayne for eleven years and before that as the referee of its Small Claims Division for four years.

Judge Mathias was born in LaGrange, Indiana, and grew up in the Fort Wayne area. He graduated with honors from Harvard University in 1976 and from the Indiana University School of Law in Bloomington in 1979, where he was a member of the moot court team. Until his appointment as small claims court referee he practiced law for six years in a medium-sized Fort Wayne law firm, concentrating in construction law, personal injury, domestic relations, and appellate practice.

Like all judges on the Court of Appeals, Judge Mathias writes over 150 opinions each year and votes on more than 300 opinions written by his fellow judges. Off the bench, he also maintains a keen interest in civic education. Judge Mathias is especially proud of his deep and long-standing commitments to the *We The People* program, which is the

civics education program sponsored by the Indiana Bar Foundation, Indiana State Bar Association, and the Indiana Judges Association, and to the Indiana Judges Association itself, which he has served as President and for which he continues to serve as a legislative liaison to the General Assembly. He is also an active member of national, state and local bar associations.

Judge Mathias has been honored to receive the Centennial Service Award from the Indiana State Bar Association, "[i]n recognition of the Indiana bar and judiciary, living and deceased, who have provided outstanding leadership and service to the public and the profession," and a Sagamore of the Wabash award from Governors O'Bannon and Kernan.

Judge Mathias and his wife, Carlabeth, have been married thirtythree years and are the proud parents of two sons, Ethan and Corbin. Carlabeth is a child and family counselor in Hamilton County. They enjoy travel, music, theater, and doing just about anything together as a family.

TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

• Judge of the Court of Appeals since August 2007

Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public

defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial **Technology and Automation Committee** (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, Steven Barnard:

Douglas E. Sakaguchi Pfeifer Morgan & Stesiak South Bend



Douglas Sakaguchi graduated from Indiana University with a Bachelors degree in Political Science and Religious Studies and received his J.D. from Valparaiso University School of Law in 1997, where he served as a Note Editor for the Valparaiso Law Review. He is an associate with the South Bend firm of Pfeifer, Morgan & Stesiak where he focuses on representing clients who have been injured by the negligence of others. He is admitted to practice in

Indiana state courts and the federal courts of the Northern and Southern Districts of Indiana.

Mr. Sakaguchi is a member of the Indiana State Bar Association, American Association for Justice, and Indiana Trial Lawyers Association. Additionally, he serves on the Board of Governors for the St. Joseph County Bar Association and as Secretary/Treasurer of the Robert A. Grant Inn of Court.

For Appellee, Metro Security Forces:

Thomas R. Hamilton Hunt Suedhoff Kalamaros LLP South Bend

Thomas R. Hamilton lives in Elkhart, Indiana and practices as a Senior Associate with the South Bend office of Hunt Suedhoff Kalamaros LLP. He obtained his B.A. in History from Wabash College in 1978 and his J.D. from the Valparaiso University School of Law in 1983. Mr. Hamilton was admitted to the Indiana bar in 1983. He then practiced with a small firm in Muncie. In 1984, he moved to Elkhart and worked with a small firm there in the areas of creditor rights, collections, business litigation and personal injury defense. In 1996, he joined the firm of Edward N. Kalamaros &

Associates in South Bend that became a part of Hunt Suedhoff Kalamaros LLP in 2000.

Mr. Hamilton currently practices in the areas of personal injury defense, creditor rights, business litigation and domestic relations law. He is a member of the Indiana State Bar Association, the St. Joseph County Bar Association, and the Defense Trial Counsel of Indiana. He has tried numerous cases in state and federal courts in northern Indiana. He also represents clients on appeal to both the state and federal appellate courts.